APPENDIX A -- ORDER OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING MOTIONS FOR ENTRY OF JUDGMENT AND FOR VACATUR OF SETTLEMENT AND REINSTATEMENT OF CLAIMS, DATED MAY 30, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN

Plaintiffs,

-v-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant.

ORDER

85 Civ. 6596 (MJL)

MARY JOHNSON LOWE, D.J.

Before the Court are motions by plaintiffs, Merex A.G. ("Merex") and Peter C. Lachmann ("Lachmann"), for (i) entry of a judgment upon the April 29, 1992, contempt rulings, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and (ii) a judgment for the vacatur of Lachmann's settlement agreement and reinstatement of his claims.

For the reasons set forth below, all of plaintiffs' motions are denied.

DISCUSSION

Motion for Entry of Judgment with Respect to Contempt Rulings

The motion for entry of judgment with respect to the April 29, 1992, contempt rulings stem from proceedings on that date between the Court and plaintiffs' counsel (the "April 1992 Proceedings"). During the April 1992 Proceedings, the Court held plaintiffs' counsel, Daniel J. O'Callaghan ("O'Callaghan"), in contempt of court. The Court ordered O'Callaghan to pay fines totalling $400.00 and Memo Endorsed transcript excerpts of the April 1992 Proceedings, which related to the contempt charges (the "Endorsement"). On April 30, 1992, O'Callaghan paid the fines and such payment was so noted on the Endorsement.

O'Callaghan contends that in order to appeal the contempt rulings, it is necessary that a judgment be entered pursuant to Rule 58 of the Federal Rules of Civil Procedure. O'Callaghan, in his Memorandum of Law in Support of Motion for Rule 58 Relief (the "Memorandum"), merely cites Rule 58 and then concludes that a Rule 58 judgment, which shall include references concerning the statements and representations made by the Court at the April 1992 Proceedings, must be entered so that an appeal may be taken.

As a preliminary matter this Court notes that Rule 58 is inapplicable to the present situation. Rule 58 applies only in certain circumstances: upon a general verdict of a jury; a decision by the court that a party shall recover only a sum certain or costs; a decision by the court that all relief be denied; a decision by the court granting other relief; or upon a special verdict or a general verdict accompanied by answers to interrogatories. None of these situations are present.

O'Callaghan, in the Memorandum, cites to the application of Rule 58 with respect to the court granting "other relief". O'Callaghan fails to mention and the Court cannot see what "other relief" this Court granted, such that Rule 58 would apply. Thus, this Court finds that Rule 58 is inapplicable.

In response to O'Callaghan's claim that in order to appeal the contempt rulings it is necessary that a judgment be entered pursuant to Rule 58, this Court notes that a judgment has already been entered. Rule 54 of the Federal Rules of Civil Procedure defines "Judgment", as used in the Federal Rules, to include a

decree and any order from which an appeal lies. "[C]ivil contempts against non-parties are immediately appealable because the appeal does not interfere with the orderly progress of the main case," *International Bus. Mach. Corp. v. U.S.*, 493 F.2d 112, 115 n.1, (2d Cir. 1973) , *cert. denied*, 416 U.S. 995 (1974). The Endorsement, is properly considered a judgment because it is a decree from which an appeal lies.

Motion to Vacate Settlement Agreement

Plaintiff, Lachmann, moves to vacate the settlement agreement that was entered into between defendants and Lachmann (the "Agreement"). Approximately two years after the Agreement was entered into, Lachmann claims that he was improperly coerced into entering into the Agreement.

In support of his argument, Lachmann states that he believed that his case would be unfairly dismissed. Lachmann admits that he knew appeal could be taken if his case was dismissed but his counsel advised him that such an appeal would be time-consuming. Lachmann states that he was under extreme financial hardship and was unfairly urged by the Court to accept the settlement.

The trial transcript annexed as part of Exhibit 3 to plaintiffs' moving affirmation clearly demonstrates that Lachmann's claim is without merit. Indeed, the trial transcript shows that the Court questioned Lachmann several times to confirm Lachmann's understanding of the consequences of the settlement. The record is devoid of any evidence that Lachmann was improperly coerced.

A settlement is a contract, and once entered into is binding and conclusive. To permit Lachmann to rescind the settlement agreement would prejudice defendants by depriving them of their bargained for right to avoid further proceedings with Lachmann. *See Janneh v. GAF*, 887 F.2d 432 (2nd Cir 1989). Lachmann does not provide any evidence that he was improperly coerced to settle. Therefore, plaintiffs' motion to vacate the Agreement is denied.

CONCLUSION

For the foregoing reasons, plaintiffs' motions are denied.

It is SO ORDERED.

Dated: New York New York
May 30, 1994

S/Mary Johnson Lowe
United States District Judge

Copies of this order to:

DANIEL J. O'CALLAGHAN, ESQ.
17 Battery Place
New York, New York 10004

ARENT FOX KINTNER PLOTKIN & KAHN
Roy A. Klein, Esq. and Ronald W. Weiner, Esq.
45 Rockerfeller [sic] Plaza
New York, New York 10111

APPENDIX B -- SUMMARY ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING JUDGMENT OF THE DISTRICT COURT DATED APRIL 7, 1995

85cv6596
SDNY
Mary J. Lowe
NR Buchwald

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York on the 7th day of April, one thousand nine hundred and ninety-five.

Present: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE DENNIS G. JACOBS,
Circuit Judges
HONORABLE FRANK A. KAUFMAN,[1]
District Judge.

MEREX A.G., and PETER A. LACHMANN,

Plaintiffs-Appellants.

v.

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

No. 94-7648

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[1]Of the United States District Court for the District of Maryland, sitting by designation.

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 7, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York (Lowe, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

In August 1985, Merex A.G. and Peter Lachmann filed suit in the Southern District of New York to recover a commission allegedly due under a modification to a 1983 Sales Representation Agreement among the parties. The complaint alternatively alleged breach of contract, *quantum meruit*, and promissory estoppel. During the trial, Lachmann agreed, at the prodding of the district court, to accept Fairchild's settlement offer of $150,000. The settlement was then placed on the record. In response to the district court's questions, Lachmann stated unequivocally that he wished to accept the settlement. He further stated that he understood that, by doing so, he settled with finality all claims against Fairchild. Later, Lachmann accepted Fairchild's settlement check, and executed a general release in favor of Fairchild.

The trial continued on Merex's claims, and, during jury deliberations, the jury, by Jury Request No. 7, requested a reading of the trial testimony of Merex Corporation's principal, G.G. Mertins, regarding: (1) his discussions with Mr. Neasham of Fairchild about the structure of the sale with China, especially the mode of payment; and (2) his testimony regarding the feasibility of a sale/resale transaction. The district court instructed counsel to identify appropriate portions of the transcript that night, so that these portions could be read to the jury the next morning.

When the trial resumed, the district court ruled that Jury Request No. 7 called for a reading of Mertins' testimony that was limited to his direct discussions with Neasham regarding the

specific issues that the jury identified. Based on this ruling, Fairchild's counsel elected not to propose several of the transcript portions contained on the preliminary list ("preliminary list") that both sides had prepared for their own use before the court's ruling. In sharp contrast and despite the district court's repeated admonitions, Lachmann's counsel, Daniel O'Callaghan, persisted in proposing to read to the jury numerous transcript portions that had nothing whatsoever to do with Jury Instruction No. 7, as interpreted by the district court. Exasperated by O'Callaghan's repeated flouting of its orders, the district court held O'Callaghan in contempt three separate times. When O'Callaghan then attempted repeatedly, in open defiance of the district court's ruling, to have the preliminary lists marked as exhibits, the court issued a fourth contempt sanction. Later, the court set the fine for the contempt sanctions at $400.

Subsequently, Lachmann moved: (1) to rescind his settlement because he had agreed to it under duress as the district court's "trial rulings, demeanor, and unnecessary criticism of [his] counsel frightened and intimidated [him]"; and (2) to vacate the contempt sanctions against O'Callaghan. The district court denied the motion. Lachmann now appeals.

1. *Lachmann's Settlement*

A settlement is a contract that is binding and conclusive. *See Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990). Settlements, like other contracts entered into under duress, are voidable. *See U.S. West Financial Servs. v. Tollman*, 786 F. Supp. 333, 340 (S.D.N.Y. 1992). Duress has been defined as a wrongful act depriving another of the exercise of his free will. *See Printers II, Inc. v. Professionals Publishing, Inc.*, 615 F. Supp. 767 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 141 (2d Cir. 1986); *see also David Nassif Assocs. v. United States*, 644 F.2d 4, 12 (Ct.Cl. 1981) ("To render an agreement voidable on grounds of duress it must be shown that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree.").

The trial record shows that Lachmann voluntarily entered into the settlement agreement. We find no wrongful conduct in the district court's prodding of Lachmann to accept the settlement. *See*

Janneh, 887 F.2d at 436 (explaining judicial policy favoring settlements). Further, he was not improperly threatened, and there were obvious alternatives to his decision to settle. Permitting Lachmann to rescind under these circumstances would violate well-settled judicial and public policies favoring out-of-court settlement, as well as deprive Fairchild of its bargained for right to avoid further proceedings with Lachmann. *See Janneh*, 887 F.2d at 436. We will not do so.

2. *Contempt Sanctions*

The district court has broad discretion to fashion an appropriate coercive remedy for a civil contempt. *N.A. Sales Co. v. Chapman Indus.*, 736 F.2d 854, 857 (2d Cir. 1984). The court's determination will not be disturbed absent abuse of discretion. *Id.* Three types of courtroom misconduct are typically subject to contempt: (1) refusal to obey court orders; (2) disrespectful remarks to the court; (3) excessive or repetitive arguments. *See United States v. Lumumba*, 794 F.2d 806, 809 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986).

We find that the district court acted within its discretion in holding O'Callaghan in contempt. The trial record demonstrates that O'Callaghan willfully refused to obey the court's order regarding the proper scope of trial testimony that responded to Jury Request No. 7, and proceeded to engage in excessive, repetitive and disrespectful arguments over the issue. The $400 civil contempt fine was reasonable, and, indeed, modest.

The decision of the district court is AFFIRMED.

s/ Joseph M. McLaughlin
HON. JOSEPH M. McLAUGHLIN

s/Dennis G. Jacobs
HON. DENNIS G. JACOBS,
Circuit Judges,

s/Frank A. Kaufman
HON. FRANK A. KAUFMAN,

District Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

APPENDIX C -- ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING WITH SUGGESTION FOR REHEARING EN BANC, DATED MAY 18, 1995

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of May, one thousand nine hundred and ninety-five.

MEREX A.G., et al.,

Plaintiffs-Appellants,

v.

FAIRCHILD WESTON SYS,

Defendant-Appellee.

Docket No.: 94-7648

/seal
UNITED STATES COURT OF APPEALS
FILED
MAY 18, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants Merex A.G., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/Carolyn Clark Campbell
Carolyn Clark Campbell,
Chief Deputy Clerk

APPENDIX D -- TRANSCRIPT EXCERPTS CONCERNING CONTEMPT OF COURT UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 29, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX. A.G., MEREX CORPORATION and
PETER C. LACHMANN,

Plaintiffs,

-*v*.-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant.

85 Civ. 6596 (MJL)

CONTEMPT OF COURT

April 29, 1992
Excerpts

Before:

HON. MARY JOHNSON LOWE
District Judge

APPEARANCES

DANIEL J. O'CALLAGHAN,
BARBARA Y. WIERBICKI,
Attorneys for plaintiff
ARENT FOX McGARRAHAN & HEARD
Attorneys for defendant
ROY A. KLEIN
RONALD W. WEINER

SEAL:
U.S. DISTRICT COURT
FILED
APR. 29, 1992
S.D.N.Y.

the proposals for both sides --

THE COURT: I have ruled on it.

MR. O'CALLAGHAN: -- to sustain my position.

THE COURT: I have ruled on it. Now you bring it up again. It's another contempt. You are going to learn to accept rulings and not keep arguing.

All right.

* * *

[Handwritten]:
30 Apr. 92 Recv'd from Daniel O'Callaghan $400.00 as payment for the contempt of Court charges.

S/[Clerk]

S/Mary Johnson Lowe
U.S.D.J.

APPENDIX E -- NOTICE OF MOTION TO ADVISE THE COURT AND FOR DIFFERING PANELS AND AFFIRMATION IN SUPPORT OF MOTION, ABSENT EXHIBITS, DATED MARCH 10, 1995, AND ENDORSED ORDER DENYING RELIEF, DATED MARCH 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number: 94-7648

NOTICE OF MOTION
To Advise the Court and for Differing Panels

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 10, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

* * *

Brief statement of the relief requested: In consequence of the continuing pendency of Appeal No. 94-9002, (Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.) and its unique nature before this Circuit, it is in the interests of justice that the Circuit assign judicial panels to these appeals of differing judges.

s/Daniel J. O'Callaghan
Appearing for: Merex A.G. & P.C. Lachmann
March 10, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/Joseph M. McLaughlin
Circuit Judge
3/17/95

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 17, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

C.A. No. 94-7648

AFFIRMATION IN SUPPORT OF
PLAINTIFFS'-APPELLANTS'
MOTION TO ADVISE THE COURT

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion to Advise the Court (the "**Motion to Advise the Court**") of the following matters which have transpired since the Court's July 14, 1994, affirmance upon "advisory jury" of Merex's appeal -- notwithstanding FRCP Rule 16, i.e., Pre-Trial Order ("**PTO**"), requirement.[2] Oral argument upon the pending appeal is scheduled for 10 a.m. on March 20, 1995. In consequence of recent events, it appears appropriate to advise the Court as follows.

2. In consequence of the Circuit affirmance of

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[2]Merex's Petition for Certiorari upon the affirmance filed with the United States Supreme Court, 94-736, was denied on January 9, 1995.

Merex's appeal in the manner identified, grounded upon CPLR § 205, i.e., within six (6) months as authorized by said CPLR provision, on January 10, 1995, Merex commenced a new action against Fairchild (now identified also as "Loral Fairchild Corporation" (collectively, "**Loral/Fairchild**")) in the United States District Court for the *Eastern District* of New York, Index No. 95 Civ. 0111.[3] The new action alleges Loral/Fairchild's tortious interference with Merex's prospective economic advantage and seeks declaratory relief relating to Loral/Fairchild's apparent culpability under 28 U.S.C., C.F.R. International Traffic in Arms, Parts 127, 130 ("**ITAR**"), which statute incorporates 22 U.S.C. § 2778 criminal penalty provisions, e.g.: "Any person who willfully violates ... shall upon conviction be fined for each violation not more than one million dollars or imprisoned not more than ten years, or both.".[4]

3. On February 9, 1995, counsel for the parties appeared before Judge Spatt at a recorded conference. Judge Spatt

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[3]On January 16, 1995, Fairchild wrote to the prior District Court (MJL) addressing Fairchild's continuing unfair sanctions applications, as well as identifying the commencement of the "new" action in the Eastern District. (Copy of Fairchild letter dated January 16, 1995, annexed as "**Ex A**".)

Initially, the new action was assigned to Chief Judge Thomas C. Platt, U.S.D.J. However, in consequence of advices received relating to Chief Judge Platt's possible conflict of interest grounded upon another matter pending before this Circuit, i.e., identified as C.A. No. 94-9002 (*Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*), Merex wrote to Chief Judge Platt concerning this potential conflict. Subsequently, the new action was reassigned to Judge Arthur D. Spatt, U.S.D.J. (Copy of Merex letter dated January 19, 1995, to Chief Judge Platt, annexed as "**Ex B**".) Thereafter, on January 27, 1995, Loral/Fairchild wrote to Judge Spatt relating to the new action, in particular requesting a transfer to the prior (Southern) District Court, however, also *unnecessarily* enclosing a copy of Merex's January 19, 1995, letter to Chief Judge Platt which had identified the possible conflict issue. (Copy of Loral/Fairchild letter dated January 27, 1995, annexed as "**Ex C**".)

[4]On February 8, 1995, Merex wrote to Judge Spatt objecting to Loral/Fairchild's unnecessary enclosure of Merex's January 19, 1995, letter to Chief Judge Platt which had referenced the conflict issue, together with an outline to Judge Spatt of CPLR § 205 grounds, including explanation of tortious interference and ITAR issues supporting the new action and Merex's request for retention of an Eastern District venue. (Copy of Merex letter dated February 8, 1995, annexed as "**Ex D**".)

stated that the Court had *not* read Merex's January 19, 1995, letter to Chief Judge Platt, that the Court would not read this letter, but rather would attend to its sealing. At the conference, Judge Spatt requested that both counsel forward letters to the Court relating to Loral/Fairchild's request to transfer the matter to the prior (Southern) District Court. Accordingly, on February 14, 1995, Merex wrote to the Court addressing the transfer issue; Loral/Fairchild responded by letter dated February 17, 1995, and, as authorized by Judge Spatt, by letter dated March 8, 1995, Merex replied to this Loral/Fairchild letter. (Copy of Merex's letter dated February 14, 1995, together with enclosure, annexed as "**Ex E**"; copy of Loral/Fairchild letter dated February 17, 1995, absent enclosures, annexed as "**Ex F**"; and copy of Merex letter dated March 8, 1995, together with an enclosure denominated therein as "Ex D", i.e., certain Fanneron deposition selections, annexed as "**Ex G**".)

4. In consequence of the continuing pendency of Appeal No. 94-9002 and its unique nature before this Circuit, it appears to be in the interests of justice that in conjunction with the novel and extraordinarily unfair proceedings exemplified in the record upon this pending Merex/Lachmann appeal, that the Circuit assign judicial panels to these appeals of differing judges.

5. In consequence of the continuing pendency of the unfair and groundless contempt rulings which in part form the basis for this appeal, other matters which affect your Affirmant's professional livelihood unnecessarily and prejudicially have been affected. For example, under requirement of other Federal courts your Affirmant is required to identify the pending "contempt" rulings, together with explanation of outcome. Recently, in a matter commenced on/about February 13, 1995, in the United States District Court for the District of Maryland (SD), identified as *W.S.A., INC. d/b/a Harmon Contract v. Republic Western Insurance Company*, 95 Civ. 437 (PJM), your Affirmant has been retained on behalf of an intervenor-subcontractor in this construction dispute. The Maryland Federal court requires that said contempt rulings be referenced and explained so that your Affirmant may be authorized to appear as counsel in that action. Accordingly, in compliance with said requirement, now Affirmant is required to forward to the Maryland Federal court a comprehensive record of the proceedings relating to this

Merex/Lachmann v. Loral/Fairchild dispute, including entries relating to the pending unfair "contempt" proceedings. Accordingly, it is appropriate and necessary so to advise this Court of the present status of this dispute and of its continuing unfairness to Merex and Merex's counsel.

WHEREFORE, Merex requests that the pending appeal upon all matters appealed and as addressed in this motion relating to assignment of differing panels upon this appeal and upon that appeal identified as C.A. 94-9002 be granted.

Dated: New York, New York
March 10, 1994

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan

APPENDIX F -- NOTICE OF MOTION FOR ADJOURNMENT AND REASSIGNMENT AND AFFIRMATION IN SUPPORT DATED MARCH 17, 1995 AND ENDORSED ORDER DENYING RELIEF DATED MARCH 20, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number 94-7648

NOTICE OF MOTION
For Adjournment and Reassignment

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 17, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

* * *

Brief statement of the relief requested: It is in the interest of justice and impartiality that this appeal be adjourned and reassigned.

s/Daniel J. O'Callaghan
Appearing for Merex A.G. and P.C. Lachmann
March 17, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/J.M. McLaughlin, Jr.
Circuit Judge
3/20/95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

C.A. 94-7648

AFFIRMATION IN SUPPORT
OF PLAINTIFFS'-APPELLANTS'
MOTION FOR ADJOURNMENT AND REASSIGNMENT

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion for Adjournment and Reassignment (the "**Motion for Adjournment/Reassignment**"). Oral argument upon the pending appeal is scheduled for 10 a.m. on March 20, 1995.

2. In accordance with the Court's rules, on March 16, 1995, a public listing of the Panel upon this appeal advised that two (2) of the judges upon the prior appeal in this dispute, i.e., the Merex Appeal No. 93-9286 (the "**Merex Appeal**"), are scheduled to hear the pending appeal, Appeal No. 94-7648 (the "**Lachmann Appeal**").

3. Respectfully, it is submitted that the outcome-determinative issue upon the Merex Appeal was the absence of enforcement of FRCP Rule 16 pre-trial order ("**PTO**")

requirements. Nonetheless, the prior Panel's affirmance upon "advisory jury" omitted all reference or mention of FRCP Rule 16's application to the Merex Appeal. Thus, it appears to be in the interests of justice and impartiality that the Lachmann Appeal grounded upon virtually identical non-enforcement of the PTO be adjourned in order that the appeal be reassigned.

4. Additionally, upon other grounds particularly relating to this counsel's representation before this Court upon other appeals upon baffling proceedings and outcomes, e.g., the appeal proceedings in *Olympia & York v. INA v. FEI, Ltd.*, Appeal No. 93-7547, and that appeal identified in the pending Motion dated March 10, 1995, i.e., C.A. No. 94-9002, it appears to be in the interests of justice and impartiality that the Lachmann Appeal be adjourned and reassigned.

WHEREFORE, Merex and Lachmann request that the pending appeal be adjourned and reassigned.

Dated: New York, New York
March 17, 1994

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan
Attorney for Plaintiffs-Appellants
MEREX A.G. and PETER C. LACHMANN
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

APPENDIX G-- NOTICE OF MOTION FOR RELIEF RE SUBJECT MATTER JURISDICTION, AFFIRMATION IN SUPPORT DATED MARCH 24, 1995, FILED MARCH 27, 1995, AND ENDORSED ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING RELIEF DATED APRIL 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number: 94-7648

NOTICE OF MOTION

* * *

Brief statement of the relief requested: In consequence of review undertaken subsequent to oral argument relating to jurisdiction, it is appropriate to advise the Court that such subsequent review indicates that this Court appears to lack subject matter jurisdiction of this appeal. Thus, it is appropriate that the Court provide other remedy so as to assure appealability of the R. 58 Order. This motion objects to jurisdiction.

S/ Daniel J. O'Callaghan
Appearing for: Merex A.G. & P.C. Lachmann
March 24, 1995

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 24, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/ Joseph M. McLaughlin
s/ Dennis G. Jacobs, per J.M.McL.
s/ F.A. Kaufman per J.M.McL.
Circuit judge

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 7, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion Concerning Jurisdiction (the "**Motion Concerning Jurisdiction**"). Oral argument upon the pending appeal was held on March 20, 1995. In consequence of the Court's discussion relating to jurisdiction, the following motion is presented.

2. At the oral argument, the Court addressed the jurisdiction of Merex's and Lachmann's counsel, this Affirmant's, participation in the appeal of the April 29, 1992, contempt rulings. Thereafter, this Affirmant undertook a further review of applicable statutes and legal precedents relating to jurisdiction. In consequence of such further review, it is appropriate to advise the Court that at the present time, *this Court appears to lack subject matter jurisdiction of the appeal from the May 30, 1994, FRCP R. 58 Order (the "**R. 58 Order**")*. Accordingly, this Affirmant objects to the subject matter jurisdiction of this Court and requests that other remedy be implemented so as to assure appealability of the R. 58 Order.

3. The grounds for the R. 58 Motion upon which this appeal had been taken were to obtain (i) vacatur of Lachmann's settlement agreement and reinstatement of Lachmann's claims, and (ii) a "judgment" upon which an appeal of the contempt rulings could have been taken, i.e., "a judgment ... entered pursuant to Rule 58... so that an appeal of the contempt rulings may be heard ... ". (A 757-762). Nonetheless, the district court by R. 58 Order declined to grant the relief requested by Lachmann and declined to issue any "judgment" upon grounds that an endorsement concerning eleven (11) excerpted transcript pages relating to Juror Request No. 7 (the "**Endorsement**") (A782h-i) was sufficient as a "judgment", notwithstanding absent "separate document" prerequisite. It was contended to this Court that the Endorsement, itself, did *not* satisfy the "separate document" prerequisite.[5]

4. The R. 58 Order does not identify or mention any judgment relating to Lachmann. The R. 58 Order does not address the merits of the contempt rulings, rather, identifies the "Endorsement" as an appealable "judgment" notwithstanding that the "Endorsement" itself did not satisfy the "separate document" prerequisite.[6] Further, this Affirmant's post-argument review of jurisdiction revealed that the R. 58 Order *itself* does not satisfy the "separate document" prerequisite: the R. 58 Order is *not* "called" a "judgment" and is *not* set forth on a separate document "*distinct*

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[5]*See Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli*, 805 F.2d 47, 48-9 (2nd Cir. 1986) ("The Supreme Court has instructed that the separate document requirement '*must be mechanically applied ...*' citing *United States v. Indrelunas*, 411 U.S. 216, 221-22, 93 S.Ct. 1562, 1565, 36 L.Ed.2d 202 (1973) (per curiam)" (p. 48, emphasis added); and "... *[C]all a judgment a judgment.* Consistent with the plain language of Fed. R. Civ. P. 58 and ... [citations omitted], we therefore hold that there was no final judgment entered ... until a separate document was filed and entered ... and that document was denominated a 'judgment'. ...." (p. 49, emphasis added).

[6]At the June 14, 1994, oral argument upon Merex's appeal, this Affirmant advised the Court that the District Court had ruled upon the R. 58 Motion and that an appeal thereupon would be presented. Thereafter, pursuant to a Motion for Retention of Appendices presented to this Court, dated June 23, 1994, Merex and Lachmann advised the Court that a notice of appeal upon the R. 58 Order was being filed together with the Motion for Retention of Appendices.

from any opinion or memorandum".[7] This prerequisite was not determined until said review of jurisdiction by this Affirmant subsequent to the March 20, 1995, oral argument -- a proceeding at which neither the Court nor counsel addressed this jurisdictional bar; rather, the Court's jurisdictional inquiries centered upon questioning Affirmant's standing to appeal. Nonetheless, as the post-argument review concerns the Court's subject matter jurisdiction, this motion promptly is presented.

6. It appears that FRAP R. 42(b) may provide an appropriate remedy. However, under the circumstances of the pendency of this appeal and conclusion of oral argument, it appears appropriate that there be brought promptly to the Court's attention this subject matter jurisdictional objection. Upon fair and just terms which would include the absence of all prejudice to the filing of a subsequent notice of appeal and the taking of such appeal upon the issuance by the district court of a "judgment" upon which the subject matter jurisdiction of this Court is accomplished, such stipulation pursuant to FRAP R. 42(b) may be appropriate. However, in order to accomplish such remedy by stipulation, it appears that this Court's assistance is necessary so as to obtain from the district court said "judgment" upon the R. 58 Order which jurisdictionally may be appealed.

7. In context of the facts and circumstances of this appeal, in consequence of the objection to subject matter jurisdiction upon the grounds as herein advised, so as to avoid further delay -- and continuing prejudice to this Affirmant concerning the inability to appeal the April 29, 1995, contempt rulings -- respectfully, it appears to be in the interests of justice that this Court instruct that the district court enter a judgment that satisfies the "separate document" prerequisite so that an appeal of denial of the R. 58 Motion can be taken, or that this Court direct other remedy so as to accomplish the "separate document" appeal

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[7]See *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2nd Cir. 1987) ("Although a one-sentence order denying a motion satisfies the separate-document requirement, ... [citations omitted], an order that is part of a district court opinion or memorandum does *not*, *see* Advisory Committee Note to 1963 Amendment of Fed.R.Civ.P. 58 (*judgment must be set forth on a separate document 'distinct from any opinion or memorandum'*) ..." (emphasis added)).

prerequisite so that such appeal may proceed.

8. Oral argument upon the Merex appeal, Appeal No. 93-9286, was heard June 14, 1994, i.e., two (2) weeks subsequent to the district court's issuance of the R. 58 Order on May 30, 1994. In consequence, by motion dated June 22, 1994, Merex and Lachmann sought the retention by the Court of appendices presented upon Appeal No. 93-9286 (the "**Appendices**") until disposition of the entire appeal. Pursuant to Order dated June 29, 1994, *inter alia*, this Court granted said motion to the extent that six (6) copies of the comprehensive Appendices instead of ten (10) copies would be acceptable for filing in a subsequent appeal.

9. As it is apparent that virtually identical Appendices will be necessitated upon any subsequent appeal from a "judgment" as a "separate document" upon the R. 58 Order, as these Appendices are comprehensive and costly to reproduce and as Merex and Lachmann lack the financial resources again to present said Appendices, respectfully, it is requested that the present Appendices upon the pending appeal, i.e., Appeal No. 94-7648, be retained by the Court or be returned by the Court to this Affirmant for supplemental filing upon any such subsequent appeal as herein addressed.

WHEREFORE, Merex and Lachmann request that this Court dismiss this appeal upon absence of subject matter jurisdiction, without prejudice, and/or direct that a FRAP R. 42(b) remedy be obtained, and/or provide other remedy so as to accomplish appealability of the R. 58 Order, and that all other relief requested in this motion be granted.

Dated: New York, New York
March 24, 1994

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan, Esq.
Attorney for Plaintiffs-
Appellants MEREX A.G. and
PETER C. LACHMANN
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APPENDIX H - NOTICE OF MOTION FOR RELIEF RELATING TO EN BANC REHEARING AND AFFIRMATION IN SUPPORT, DATED APRIL 12, 1995 AND ENDORSED ORDER GRANTING IN PART RELIEF REQUESTED DATED APRIL 26, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,
Plaintiff, Appellants,

MEREX CORPORATION,
Plaintiff,

v.

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant-Appellee.

Docket Number 94-7648

NOTICE OF MOTION
For Relief relating to En Banc Rehearing

* * *

Brief statement of the relief requested: An order granting additional time and additional pages concerning a Petition for Rehearing En Banc. An order authorizing that there be annexed to the En Banc Petition for Rehearing a copy of the transcript pages of the April 29, 1992, proceeding so that the contempt rulings justly may be reviewed.

s/Daniel J. O'Callaghan
Appearing for Merex A.G., et al.
4/12/95

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 13, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted [Handwritten:]

to the extent that the petition for rehearing with suggestion for rehearing in banc (1) shall be not more than 30 pages, (2) may be filed on or before May 5, 1995, and (3) may include up to 10 pages of transcript from the 5/10/92 hearing provided same was furnished to panel in appendix. 4/-26-95.

s/Dennis Jacobs
Circuit Judge

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 26, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion Relating to *En Banc* Rehearing (the "**Motion Relating to *En Banc* Rehearing**").

2. In context of the record in these proceedings since 1985, the Summary Order affirmance dated April 7, 1995, and the requirement for submission of any *en banc* rehearing within fourteen (14) days, i.e. on/before April 21, 1995, the following relief is requested:

> (i) the grant of permission to serve and file a Petition for Rehearing *En Banc* (the "**Petition**") of no more than thirty (30) pages in length;
>
> (ii) the grant of permission authorizing that there be annexed to the Petition a copy of the transcript pages of the April 29, 1992, proceedings so that the contempt rulings justly may be reviewed;

(iii) the grant of an extension of time for service and filing of the Petition to and until May 5, 1995;

WHEREFORE, Merex and Lachmann request that this Court grant all relief requested in this motion.

Dated: New York, New York
April 12, 1995

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan, Esq.
Attorney for Plaintiffs-
Appellants MEREX A.G. and
PETER C. LACHMANN
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APPENDIX I -- NOTICE OF MOTION AND AFFIRMATION IN SUPPORT OF MOTION FOR RELIEF CONCERNING JURISDICTION AND EN BANC PROCEEDINGS, ABSENT EXHIBITS, DATED MAY 22, 1995 AND ENDORSED ORDER DENYING RELIEF DATED JUNE 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number: 94-7648

NOTICE OF MOTION
For relief concerning Jurisdiction
& En Banc Proceedings

* * *

Brief statement of the relief requested: In consequence of the series of otherwise unexplainable appeal proceedings in which this counsel has appeared, i.e., that appeal identified as *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, C.A. No 94-9002, and *Olympia & York v. INA v. FEI, Ltd.*, C.A. No. 93-7547, it is appropriate that an explanation be provided by the Court.

s/Daniel J. O'Callaghan
Appearing for: Merex A.G. & P.C. Lachmann

May 22, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

S/J. M. McLaughlin

S/ D. G. Jacobs (per J.M. McL)

S/ F. A. Kaufman (per J.M. McL.)
Circuit Judge

Seal/
UNITED STATES COURT OF APPEALS
FILED
JUNE 7, 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,
Plaintiffs-Appellants,

MEREX CORPORATION,
Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant-Appellee.

C.A. No. 94-7648

AFFIRMATION IN SUPPORT OF
PLAINTIFFS'-APPELLANTS'
MOTION CONCERNING JURISDICTION
-and-
EN BANC PROCEEDINGS

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion Concerning Jurisdiction and *En Banc* Proceedings (the "**Motion Concerning Jurisdiction and *En Banc* Proceedings**"). This motion is presented in consequence of proceedings held before this Court which objectively appear to evidence the absence of fairness throughout this dispute as well as the absence of fairness concerning other disputes upon appeals to this Court presented by this counsel which in *toto* appear to support the existence of an unfair effort to discredit and otherwise adversely affect this counsel. For example, this motion is grounded not only upon this Court's unfair affirmances in both this Merex/Lachmann appeal -- as well, the initial Merex appeal -- but also upon two (2) other matters, viz., that appeal identified as *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.* (the

"**LeBoeuf, Lamb Appeal**"), C.A. No. 94-9002, and *Olympia & York v.INA v. FEI, Ltd.*, (the "**O&Y Appeal**") C.A. No. 93-7547 (*en banc* petition filed September 29, 1994), both of which other appeals appear to evidence a similar absence of any proper grounds for denial of all relief, rather, appear to support unfair proceedings concerning this counsel and his clients, especially his client in the LeBoeuf, Lamb Appeal and the facts and circumstances concerning that dispute which have particular significance to this Court.

2. On April 12, 1995, in the matter identified as *Merex A.G. v. Loral Fairchild Corporation and Fairchild Weston Systems, Inc.*, 95 Civ. 0111 (ADS) (EDNY) (the "**Loral/Fairchild Action**"), Merex wrote to the court in that matter requesting adjournment of submission of opposition papers to a Loral/Fairchild motion to dismiss and for sanctions. (Copies of two (2) Merex letters together with enclosures, dated April 12, 1995, annexed as "**Ex 1**"). By Order dated April 13, 1995, the court denied Merex's application. In consequence, by facsimile dated April 14, 1995, Merex requested reconsideration grounded upon the facts and circumstances addressed in Merex's two (2) April 12, 1995, letters, together with additional facts relating to absence of staff and upon medical circumstance. Subsequently, during a lengthy telephone conference held on April 18, 1995, by Order of same date, the court upon reconsideration granted Merex's request for extension of time for submission of opposition papers. (Copies of the Orders dated April 13, 1995, and April 18, 1995, together with Merex's counsel's facsimile dated April 14, 1995, annexed as "**Ex 2**").

4.[sic] Contemporaneously, on April 13, 1995, Merex/Lachmann filed a motion requesting "Relief relating to *En Banc* Rehearing" ("**Motion/*En Banc***"), in particular requesting (i) an extension of time for submission of an *en banc* petition; (ii) authorization for additional pages; and (iii) inclusion of trial transcript excerpts. As disposition of this motion was not made in reasonable time for effect upon the relief requested therein, so as to comply with the *en banc* rehearing time limitation which necessitated filing of *en banc* application by April 21, 1995, timely, Merex/Lachmann on April 21, 1995, filed an *en banc* petition (the "***En Banc* Petition**").

5. Nearly two (2) weeks subsequent to the filing of the Motion/*En Banc* -- an application upon which the Court had

not ruled -- and four (4) days subsequent to the filing of the *En Banc* Petition, this counsel, on April 25, 1995, filed an additional *en banc* petition in the LeBoeuf, Lamb Appeal . Thereafter, by Order dated the next day, April 26, 1995, this Circuit granted in part the Motion/*En Banc* (the "***En Banc* Order**"), which notwithstanding filed April 26, 1995, was not mailed to this counsel until April 29, 1995, and was not received until May 2, 1995, i.e., just three (3) days prior to the May 5, 1995, limitation for filing of modified *en banc* petition therein as so authorized, a circumstance which precluded this counsel's ability to act upon the *En Banc* Order. (Copies of *En Banc* Order dated April 26, 1995, together with Second Circuit forwarding envelope postmarked April 29, 1995, together annexed as "**Ex 3**"). In the interim, this motion has been delayed in presentation, *inter alia*, in consequence of this counsel's required participation as counsel of record and other circumstances as addressed upon those other matters identified in the April 12, and April 14, 1995, letters, *supra*.

6. In consequence of the series of otherwise unexplainable appeal proceedings in which this counsel has appeared, respectfully, it is requested that there be provided a statement which addresses the: (i) grounds for absence of enforcement -- and non-mention -- of R. 51 and R. 58 apparent controlling facts, circumstances and precedent upon the pending Merex/Lachmann appeal, (ii) grounds of jurisdiction upon the contempt rulings, and (iii) grounds of timing of issuance of the Order/*En Banc*.

WHEREFORE, Merex/Lachmann requests that all matters requested in this motion be granted.

Dated: New York, New York
May 22, 1995

s/Daniel J. O'Callaghan
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